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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-418

GILBERT FISHER,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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GILBERT FISHER,

Petitioner,

—v.—

UNITED STAES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Gilbert Fisher prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction.

Opinion Below

The yet unreported opinion of the Court of Appeals, affirming the judgment of conviction herein may be found in Appendix A hereto, *infra*, pp. 1a-12a.

Jurisdiction

The opinion of the Court of Appeals was filed on June 30, 1975. The mandate of the Court was recalled and stayed pursuant to Rule 41(b) of the Federal Rules of Appellate procedure on August 18, 1975.* The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

1. The First Amendment to the United States Constitution.

2. The Fifth Amendment to the United States Constitution.

3. The Ninth Amendment to the United States Constitution.

4. 26 U.S.C. 7201 (Income Tax evasion).

The provisions are set forth in Appendix C to this petition.

Questions Presented

In a prosecution for income tax evasion, was the petitioner's First Amendment right of privacy and Fifth Amendment right to a fair trial violated by permitting his estranged wife to testify as his chief accuser.

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* Annexed hereto as Appendix B is the order of the Court of Appeals recalling its mandate.

Statement of the Case

A. The Charges

On April 11, 1974 an indictment was filed in the District Court for the Southern District of New York charging petitioner with four counts of income tax evasion for the years 1967 through 1970 inclusive, in violation of Title 26, United States Code, Section 7201.

Petitioner's first trial commenced on September 9, 1974, and resulted in a mistrial on September 19, 1974 because of the inability of the jury to reach a verdict.

A second trial began on November 4, 1974 and was concluded on November 8, 1974 upon the jury's verdict of guilty on all four counts.

On December 6, 1974, petitioner was sentenced to concurrent terms of imprisonment of fifteen months on each of the four counts and fined a total of $10,000.00.

B. Summary of the Prosecution's Case

Through the testimony of Rosalie Fisher the petitioner's estranged wife, the government using a "specific cash expenditure" theory, sought to prove that petitioner had understated his income, derived principally from gambling, for the years 1967 through 1970 inclusive.

Through Mrs. Fisher, the government sought to prove that petitioner using nominees made cash expenditures for a variety of items far in excess of his reported income. It is undisputed that without the testimony of his wife, petitioner's conviction could not be sustained. Consequently, it would be appropriate to state in some detail the marital relationship between petitioner and Rosalie Fisher the prosecution's witness-in-chief.

C. The Background and Relationship of Petitioner and Rosalie Fisher

During his tenure as a member of the armed services, petitioner, in 1942 married Rosalie Fisher (R. 102-103).* Following his honorable discharge, petitioner and his wife cohabited in New York City where he became a member of the police department. Following his resignation from law enforcement in 1955, petitioner, his wife Rosalie and other members of his family operated a number of restaurants in the Harlem area (R. 103-104). From 1960 to 1969, these restaurants became the focal point of petitioner's numbers gambling ventures (R. 556-557). However, toward the end of 1969, he was compelled to curtail his operations.

Despite a conjugal separation from his wife, Rosalie, in 1964, the two continued to operate as close business partners until 1971.** Indeed they in fact filed joint income tax returns up through that year (R. 119-245).

In 1972, the Internal Revenue Service began an audit of the couple's returns. At approximately the same time, petitioner commenced an action for divorce in Nevada. Scorned by her husband's action in seeking a divorce and facing serious criminal charges, Mrs. Fisher agreed to testify against petitioner (R. 219-245, 713-841).

The petitioner was awarded a divorce in Nevada in 1972 but his wife Rosalie sought to set the divorce aside

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* References in parenthesis preceded by the letter "R." refer to the appropriate pages of Appendix on file in the Court of Appeals.

** During the course of this separation, petitioner lived with his paramour Bernice Duncan with whom he had had two sons (R. 752).

and later appealed the decision of the divorce court both on the merits as well as jurisdictional grounds (R. 819-823).

Petitioner first became aware of Rosalie's appeal (filed on May 28, 1974) shortly prior to his second trial. He promptly informed the trial court and noted his objection to any further testimony by Rosalie.

The Court nevertheless, permitted Mrs. Fisher to testify against petitioner.* Through that testimony petitioner realized the timeliness of William Congreve's admonition that "Heaven has no rage like love to hatred turned, nor hell a fury like a woman scorned."

REASONS FOR GRANTING THE WRIT

This case raises important questions as to the scope and continued viability of the rule of spousal incompetency, in view of the modern trends of evidence and the expanding right to privacy under the First, Fifth and Ninth Amendments to the Constitution of the United States.

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* The trial court overruled petitioner's objection (R. 72-73). The Court of Appeals found that the trial Court had correctly ruled based on the doctrine of waiver. We submit, however, that the waiver finding was clearly in error. See *infra*, pp. 13-14.

ARGUMENT

In a prosecution for income tax evasion, was the petitioner's First Amendment right to privacy and Fifth Amendment right to a fair trial violated by permitting his estranged wife to testify against him.

A. Introduction—An Analysis of the Decision of the Court Below.

The Court of Appeals considered the issues presented in the instant case in three parts, to wit; did petitioner have the right to assert spousal incompetency in view of a decree of divorce, albeit with an appeal pending by the testifying spouse; did petitioner waive his right to assert the privilege in view of his failure to object during a prior proceeding; and should the concept of spousal immunity be applied to the case at bar in light of "reason and experience."

Noting the absence of any meaningful authority on the effect of an appeal on a decree of divorce, the Court of Appeals refused to "view the technical finality of the divorce decree as controlling" (5a). Instead, the Court, ignoring the teaching of *Hawkins* v. *United States*, 358 U.S. 74 (1958), decided that "in light of reason and experience", the privilege should not be extended to the instant case and in any event, petitioner had waived his right to assert the privilege.

B. The Concept of Spousal Immunity is a Viable Doctrine and Should Have Been Applied in the Instant Case.

The common law principle of spousal immunity is a viable doctrine necessitated by the Constitutional right of privacy inherent in a marital relationship. *Griswold* v.

Connecticut, 381 U.S. 479 (1965). Moreover, the prohibition of testimony by one spouse against the other militates against "*the danger of* causing dissension" and of "disturbing the peace of families" and is based upon "a natural repugnance in every fair minded person to compelling a wife or husband to be the means of the others condemnation." 8 Wigmore, *Evidence*, sec. 2278 at 216 (*McNaughton* rev. 1961, emphasis in original).

1. The Constitution and the Right to Privacy Inherent in a Marital Relationship.

Although the Constitution does not explicitly describe any right of privacy, a line of cases culmanating with *Roe* v. *Wade*, 410 U.S. 113 (1973) have recognized that a right of personal privacy or "zones of privacy" do exist. (*Roe* v. *Wade*, *supra*, at p. 152 and the cases cited therein.) Moreover, a number of these cases have extended that right to the marital relationship and activities relating thereto. *Griswold* v. *Conecticut*, 381 U.S. 479 (1965); *Loving* v. *Virginia*, 388 U.S. 1, 126 (1967); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-542; *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944), and *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

It is petitioner's position that this right of privacy whether it be found in the "concept of ordered liberty" (*Meyer* v. *Nebraska*, *supra.*); the Ninth Amendment's restriction against state action, or the "penumbra of rights" under the First Amendment, acts as a prohibition against one spouse testifying against the other.

In *Griswold*, Justice Douglas in striking down a Connecticut statute outlawing the use of contraceptive devices by married couples, found that that law operated "directly on the intimate relationship of husband and wife . . ." and that the relationship was protected by the

First Amendments "penumbra where privacy is protected from governmental intrusion."

Similarly, in the instant case, the confidential nature of the marital relationship falls within these "zones of privacy" to the extent that a breach of that relationship occurs by the state action of compelling one spouse to testify against another concerning transactions and events which occurred when the parties were lawfully married. To permit one spouse to be condemned by the words of his intimate life partner, is to violate the constitutional protection against governmental invasion "of the sanctity of a man's home and the privacy of life". *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), and *Griswold, The Right To Be Left Alone*, 55 N.W.U.L. Rev. 216 (1960).

The present case then concerns a relationship lying within the zones of privacy created by "several fundamental constitutional guarantees". As noted by Justice Douglas in *Griswold*:

> "We deal with a right of privay older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." 486.

Contemporary America is faced with a breakdown in society which in turn is based upon breakdown of family relationships. Certainly governmental action encouraged by the Courts to further erode the marital relationship should not be encouraged.

2. The Concept of Spousal Immunity is a Viable Doctrine in Light of Reason and Experience.

Rule 26 of the Federal Rules of Criminal Procedure provides in relevant part that:

> "In all trials . . . the . . . competancy and privileges of witnesses shall be governed . . . by the principles of the comomn law as they may be interpreted by the Courts of the United States in the light of reason and experience."

Under the common law, a husband and wife were incompetent as witnesses for or against each other. See 1 Coke, *Commentary Upon Littleton* (19th ed. 1832), 6.6. Although the rule became accepted in this country, its underlying rationale (eg. to foster peace in the family) became much maligned and several exceptions were carved out of the general rule.* See *Stein* v. *Bowman*, 13 Pet. 2091, 10 L.E.D. 129 (wife competent where husband commits crimes against her); *Funk* v. *United States*, 290 U.S. 371 (1933) (spouses may testify for each other).

Despite the criticism of the rule, the Supreme Court in *Hawkins* v. *United States*, 358 U.S. 74 (1958) declined to further erode the concept of spousal immunity.

In *Hawkins*, a prosecution for violation of the "Mann Act", the petitioner's chief accuser was his estranged wife. At the time of the acts complained of the petitioner's wife was living apart from him under an assumed name. At the time she testified they were also living

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* Many commentators have concluded that the privilege is unjustified, and is merely a "legal anachronism" or an archaic survival of a mystical religious dogma. 8 Wigmore, *Evidence;* See 2228 *et seq.;* McCormick, *Evidence*, Sec. 66 (2d ed. 1972). But cf. Comment, *"The Husband-Wife Privileges of Testimonial Non-Disclosure,* 56 N.W.L. Rev. 208, 210 (1961).

apart, and in his testimony the petitioner referred to her as his "ex-wife" (See concurring opinion of Justice Stewart, 358 U.S. at p. 82 N.4).*

Despite the tenuous nature of the Hawkins' marital relationship, the Court refused to abandon "an exclusionary rule based on the persistent instincts of several centuries. . . ." Mr. Justice Black speaking for the court reasoned that:

> " . . . We are not prepared to say the same about the rule barring testimony of one spouse *against* the other. The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now. Moreover, it is difficult to see how family harmony is less disturbed by a wife's voluntary testimony against her husband than by her compelled testimony. In truth, it seems probable that much more bitterness would be engendered by voluntary testimony than by that which is compelled. But the Government argues that the fact a husband or wife testifies against the other voluntarily is strong indication that the marriage is already gone. Doubtless this is often true. But not all marital flare-ups in which one spouse wants to hurt the other are permanent.

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* The factual similarity between Mr. Hawkins and his wife and petitioner and his wife is remarkable. Yet the Court of Appeals totally ignored this similarity.

> The widespread success achieved by courts throughout the country in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage. 358 U.S. 74, 77-8.

In almost total disregard for the facts and teaching of *Hawkins* and decisions within the Second Circuit, the Court below interpreted the privilege as not applicable to petitioner. See *United States* v. *Walker*, 176 F.2d 564 (2d Cir., 1949).

In *Walker*, *supra*, the defendant was convicted of interstate transportation of sums of money that had been taken by fraud. His was a "confidence game" in which he defrauded women by bigamously marrying them and then absconding with their funds. However, in relation to one of these women, the defendant by circumstance effected a legally binding marriage. Subsequently, he left her destitute and "married" two additional women pursuant to his usual pattern. At his trial, all three women were permitted ot testify. The "wife" with whom he had effected a binding marriage was in the process of obtaining a divorce at the time of trial. Tenous as the marriage bond was, Chief Judge Hand ruled that the conviction of the defendant had to be overturned because his "wife" was incompetent to testify against him. Recognizing the conflict that the incompetency rule posed to the interest in seeking absolute truth in the Courts, he wrote:

> ". . . This conflict of interest is by no means one-sided, because, although it is not very usual for it to arise unless the spouses are estranged, not all estrangements are final, and nothing could more

> dispose the privileged spouse to treasure enmity and to repulse any overtures of reconciliation than the memory of what will ordinarily rankle as treachery. Nor is it either practicable or desirable to make the decision dependent upon the Judge's conclusion that in the instance before him the marriage has already been so far wrecked that there is nothing to save. That was true, no doubt, here; but we must look beyond the case before us. The question will always arise in the progress of the trial; it must be decided at once; and its answer will introduce a collateral inquiry likely to complicate the trial seriously. The common law avoided such an inquiry by taking divorce as the only test; and, while the privilege persists at all, there is every reason so to limit the exception."

Finally, the narrow construction given to the concept of spousal immunity by the Court of Appeals in the instant case has been belied by legislative fiat. It will be recalled that after the Rules of Evidence were promulgated by this Court in November 1972, opposition focused almost immediately on the article on privilege.* More specifically, proposed Rule 505 which dealt with spousal privilege and immunity was extensively criticized for being too narrow. *Weinstein's Evidence*, U.S. Rules, Vol. 2, Sec. 501(01). As a result, Congress, with the stated intention "to leave the Federal law of privilege where we found it", refused to enact Rule 505.**

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* See e.g., *Hearing On Proposed Rules of Evidence Before Special Sub-committee on Reform of Federal Criminal Laws of the House Committee on the Judiciary.* 93d Cong., 1st Sess., ser. 2 at 130 (1973).

** See the remarks of Chairman Hungate of the House Judiciary Committee explaining the final "Conference Report" version of the rules. Congressional Record H12254 (daily edition 12/18/74).

Therefore any attempt by the Second Circuit to narrow the concept of common law spousal immunity as enunciated in *Hawkins, supra,* is wholly inappropriate and should not be permitted to stand by this court.

There Was No Waiver

As noted above, the Court below also held that the petitioner had "waived" the spousal privilege by failing to object to his wife's testimony in a prior proceeding.

The Court of Appeals, however, ignored the notion that there was presented to the District Court a serious question of fact; to wit, whether the petitioner's failure to object to his wife's testimony in his first trial was a "knowing waiver" in view of his assertion that he had learned of his wife's "appeal" shortly prior to the second trial. Indeed justice would have been better served had the District Court conducted a brief evidentary hearing to deterimne whether in fact there had been a knowing waiver.

Assuming *arguendo,* that the waiver was a knowing one the conclusion of the Court of Appeals is still incorrect.

Its finding is belied by a number of cases which clearly hold that "a waiver is limited to a particular proceeding in which a witness volunteers his testimony". *United States* v. *Steffen,* 103 F. Sup. 415 N.D. Cal. (1951); *Poretto* v. *United States,* 196 F.2d 392 (5th Cir. 1952); *In Re Neff,* 206 F.2d 149 (3rd Cir. 1953); *United States* v. *Malone,* 111 F. Sup. 37 N.D. Calif. (1953); *United States* v. *Vadner,* 119 F. Sup. 330 E.D. Penn. (1954); *United States* v. *Miranti,* 253 F.2d 135 (2d Cir. 1958); *United States* v. *Field,* 193 F.2d 109 (2d Cir. 1951).

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Sept. 11, 1975
On the Petition:
FRED L. WALLACE, ESQ.

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 877—September Term, 1974.
(Argued April 7, 1975 Decided June 30, 1975.)
Docket No. 74-2684

UNITED STATES OF AMERICA,

Appellee,

—against—

GILBERT FISHER,

Appellant.

Before:

FRIENDLY and FEINBERG, *Circuit Judges,*
and LASKER, *District Judge.**

Appeal from judgment of conviction after jury trial before Edward Weinfeld, *J.*, in the United States District Court for the Southern District of New York, finding appellant guilty of four counts of evasion of personal income taxes, in violation of 26 U.S.C. § 7201.

Affirmed.

FRED L. WALLACE, Esq., New York, New York, *for Appellant.*

* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A
Opinion of the United States Court of Appeals

KENNETH R. FEINBERG, Esq. (Paul J. Curran, United States Attorney, Southern District of New York, Lawrence Iason, II and Lawrence S. Feld, of Counsel), *for Appellee.*

LASKER, *D.J.*

Gilbert Fisher appeals his convicttion on a four count indictment charging evasion of personal income taxes for the years 1967 through 1970, in violation of 26 U.S.C. § 7201. Fisher's first trial in September, 1974, before Judge Edward Weinfeld in the Southern District of New York, ended in a hung jury. At the second trial which began November 4, 1974, the jury returned a guilty verdict on all counts. Fisher was sentenced to concurrent fifteen month terms of imprisonment on each count and fined $10,000.

The Govenrment used the specific cash expenditure method of proof to establish that during the tax years in question Fisher had accumulated large amounts of unreported income from an illegal gambling business. The Government presented witnesses who testified that Fisher attempted to prevent discovery of his actual income by using nominees to purchase items for him. Although Fisher raises a host of issues of appeal, the only one which merits extended consideration concerns the competency of one of the witnesses who testified against him.

I.

The major witness for the Government was Rosalie Fisher. At the first trial, the Government offered in evidence the Nevada divorce decree which appellant had obtained against Mrs. Fisher on July 21, 1972, and called

her as a witness, both without objection by defense counsel. Immediately prior to the commencement of the second trial, however, Fisher moved to suppress the testimony of Mrs. Fisher. He asserted that an appeal taken by her from the Nevada decree dissolved the finality of their divorce and that, because the Fishers were therefore still married, Mrs. Fisher's testimony was barred by the spousal privilege. Judge Weinfeld denied the motion on the grounds that no privilege existed [1] and that in any event Fisher had waived it by his failure to object at the first trial.

The privilege of a party against the use of a spouse's adverse testimony in federal criminal trials is governed by Rule 26, Federal Rules of Criminal Procedure, which reads:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principes of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

At common law and as applied by federal courts, the spousal privilege continues only for the duration of the

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[1] Fisher had also asserted the privilege against admission of confidential communications between spouses. He does not argue on appeal that the denial of this privilege was error.

marirage; divorce removes the bar against testifying.[2] *Pereira* v. *United States*, 347 U.S. 1, 1 (1954); Wigmore, Evidence § 2237 (McNaughton rev. 1961). Appellant asserts that the fact that an appeal from a final divorce decree has been pending since May, 1974 restores the marital relationship, but cites no authority for the proposition under Nevada Law or otherwise. Indeed, a reading of the relevant Nevada statute suggests the contrary, for a decree of divorce granted in Nevada by a court of competent authority "fully and completely dissolve[s] the marriage contract as to both parties." Title 11, Nev. Rev. Statutes § 125.130. Moreover, although no state statute specifically covers the effect of a pending appeal on the finality of a divorce decree, an appeal in Nevada does not in general abate the force of a judgment absent a stay pending appeal. Rule 8(a), Nev. R. App. Proc. Authority under the law of other states is at odds with Fisher's contention. *E.g.*, *Sullivan* v. *Commissioner of Internal Revenue*, 256 F.2d 664, 667-668 (4th Cir. 1958) (Maryland); *Hudson* v. *State*, 295 So. 2d 766, 769-770 (Miss. 1974).[3]

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[2] The particular privilege asserted here, which bars adverse testimony by a spouse, is to be distinguished from the privilege against disclosure of confidential communications between spouses, which is not dissipated on termination of the marriage. See Richardson, Evidence § 455; McCormick, Evidence § 146.

[3] We also note that Rule 803(22), Federal Rules of Evidence, which permits the admission into evidence of a prior judgment of conviction in certain circumstances, specifically states: "The pendency of an appeal may be shown but does not affect admissibility." See also *Roberson* v. *California*, 501 F.2d 305, 308 (2d Cir. 1974) (parole may be revoked on the basis of a conviction still on appeal; *United States* v. *Soles*, 482 F.2d 105, 107-8 (2d Cir.), *cert. denied*, 414 U.S. 1027 (1973) (prior conviction may be used for impeachment even though still on appeal); Rest. of Judgments 2d, § 41, comment f, Tentative Draft No. 1, March 23, 1973 (judgment is "final" even though an appeal is pending).

However, we do not view the technical finality of the divorce decree as controlling the issue before us, for regardless of the answer to the question whether the appeal from a final decree of divorce reinstates the spousal privilege, we decline to stretch the assertion of the privilege to the circumstances in the present case.

The rule that the spouse of a party to an action is totally disqualified as a witness was firmly established at common law by the second half of the seventeenth century. Wigmore, Evidence § 2227. The mystical and religious foundations of the privilege [4] have long since eroded, and the once absolute disqualification of a spouse has been narrowed to the present rule which only forbids testimony by one spouse which is adverse to the other spouse. *Funk* v. *United States*, 290 U.S. 371 (1933). The sole surviving rationale for the privilege is the belief that the trust and confidence between spouses should not be betrayed, and that the policy of fostering family stability benefits both the family unit and the public. *Hawkins* v. *United States*, 358 U.S. 74, 77 (1958); *Stein* v. *Bowman*, 13 Pet. 209 (1839), citing *Aveson* v. *Kinnard*, 9 East. 192; see *United States* v. *Termini*, 267 F.2d 18, 19 (2d Cir. 1959); *United States* v. *Walker*, 176 F.2d 564, 568 (2d Cir.), *cert. denied*, 338 U.S. 891 (1949).

In *Hawkins*, *supra*, the Supreme Court was faced with the question whether the spousal privilege should be abolished. The Court exercised its authority under Rule

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[4] See Coke, A Commentarie Upon Littleton 6B (1628) ("... a wife cannot be produced either for or against her husband, ... [for they are two souls in one flesh.]") At common law, a married woman had no independent legal status apart from that of her husband.

26, Federal Rules of Criminal Procedure, to "interpret" the privilege and declined to discard it. Although the *Hawkins* Court acknowledged that adverse testimony by one spouse against another is in itself often strong indication that the marriage is unsalvageable, it pointed to successful attempts by courts in achieving concilation among family members to demonstrate that some apparently broken relationships can be saved and, in view of those efforts, was reluctant to abandon a rule honored through several centuries. 358 U.S. at 78. Nevertheless, the Court clearly did not intend to perclude reevaluation of its holding in future cases, for it stated:

> ". . . this decision does not foreclose whatever changes in the rule may eventually be dictatad by 'reason and experience.'" 358 U.S. at 79.

We are aware, as was the Court in *Hawkins*, of vociferous criticism which has characterized the rule as an archiac residue of discarded dogma and an attempt to foster familial harmony which is often more apparent than real. See, *e.g.*, *Hawkins* v. *United States*, *supra*, 358 U.S. at 81 (Stewart, *J.* concurring); *United States* v. *Termini*, *supra*, 267 F.2d at 20; *Yoder* v. *United States*, 80 F.2d 665 (10th Cir. 1935); McCormick, *Evidence* 145-146 (2d Ed. 1972); Comment, 17 U. Chi. L. Rev. 525, 530 (1950). But the government has not argued for total rejection of the privilege, and we thus need not consider whether conditions have so changed since 1958 as to warrant an inferior court reconsidering the issue decided in *Hawkins*. Rather, viewing the matter before us in the light of "reason and experience," as Rule 26 instructs us to interpret the privilege, we believe that to permit appellant to assert the privilege in the present case could not possibly achieve the intended benefit of the rule and would serve only to thwart common sense.

Appendix A
Opinion of the United States Court of Appeals

Appellant married Rosalie Fisher in 1942. They have had no children and have not cohabited since 1964. Fisher does have two children by another woman, Bernice Duncan, one born in 1962 and another a year later. He and his parents built a home for them in 1967 and Fisher has been living with Miss Duncan for some time. He subsequently sued his wife for divorce and was granted a final decree in 1972. At the divorce proceedings he testified that there was "no chance of reconciliation," and at his second trial Fisher's defense counsel, attacking Rosalie Fisher's anticipated testimony, asserted "He rejected her. They have been married for some time and now he is remarried and the father of two wonderful children . . ." Trial transcript at page 36.

However optimistically the Court in *Hawkins* viewed conciliation efforts by courts in general, there is no reason whatever to believe that the pending appeal by Mrs. Fisher from the divorce decree will spark successful attempts to save this marriage [5] and there is accordingly no justification for applying the spousal privilege.

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[5] In *United States* v. *Walker*, this court cautioned against a case by case determination as to whether a defendant should be permitted to assert the spousal privilege, and stated:

> "[It is neither] practicable [nor] desirable to make the decision dependent upon the judge's conclusion that in the instance before him the marriage has already been so far wrecked that there is nothing to save . . . The question will always arise in the progress of the trial; it must be decided at once; and its answer will introduce a collateral inquiry likely to complicate the trial seriously." *United States* v. *Walker*, *supra*, 176 F.2d at 568.

[Footnote continued on following page]

An additional reason for the refusal to permit appellant to assert the privilege is his failure to object to the Government's use of Mrs. Fisher as a witness at the first trial. The spousal privilege is waived by failure to object when the spouse is called to the stand. *Peek* v. *United States*, 321 F.2d 934, 943 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964); *Olender* v. *United States*, 210 F.2d 795, 800 (9th Cir. 1954); Wigmore, Evidence § 2242. Fisher contends that he first learned of the pending appeal the night before the commencement of the second trial and that his earlier failure to object was not a "knowing" waiver that precluded him from later asserting the privilege. *Peek* v. *United States*, *supra*, 321 F.2d at 943-944. However, the trial judge had every right to disbelieve Fisher since the notice of appeal in the Nevada action was filed on May 28, 1974 and became a matter of public record three months before Fisher's first trial began. Moreover, a copy of the appeal was served on Fisher's counsel in the divorce action on May 3, 1974. Fisher does not contend that his ignorance of the pendency of the appeal was due to any negligence on the part of his counsel and his alleged failure to learn of the appeal until

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In addition, the court in *Walker* stressed that any change in the nature of the privilege be made either by Congress or after "an overwhelming general acceptance by the states of abolition of the privilege." *Id.*

However, *Walker* was decided nine years before *Hawkins*, which gave the courts greater latitude to review the propriety of the assertions of the spousal privilege than existed at the time of Judge Learned Hand's opinion in *Walker*. See *Hawkins* v. *United States*, *supra*, 358 U.S. at 79. Upon such a review we find that when evidence that a marriage is in fact destroyed is as conclusive as it is in the present case, recognition of this fact by the trial judge will neither complicate nor delay the progress of a trial.

November 3, 1974, cannot excuse his failure to object to Mrs. Fisher's testimony at the first trial.

We therefore conclude that, quite apart from the lack of merit in the argument concerning Mrs. Fisher's appeal, it was proper to decline to permit Fisher to assert the spousal privilege both because he waived his right to do so and because, even if there had been no waiver, the privilege does not extend to a "marriage" so obviously destroyed as the one here. In so holding, we stress that a case by case determination of the applicability of the privilege is appropriaite only where the undisputed evidence that the marriage is beyond salvation is so conclusive that no extended collateral inquiry is necessary and the trial will not be complicated or delayed by the determination.

II.

The other issues which Fisher raises have even less merit. Fisher contends that the district judge abused his discretion when he refused to grant a continuance for the second trial beyond November 4, 1974. However, there is no basis in the record for the claims that the judge's decision was motivated by bias, and in any event the month and a half hiatus between trial certainly afforded defense counsel sufficient time to prepare for this relatively uncomplicated trial.[6] In sum, Judge Weinfeld properly exercised his discretion in denying the requise for a continuance. *See Ungar* v. *Sarafite*, 376 U.S. 75, 89 (1964); *United States ex rel. Lucas* v. *Regan*, 503 F.2d 1, 3 (2d Cir. 1974).

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[6] Fisher decided to substitute attorneys on October 4, 1974 but new counsel still had one month in which to prepare for trial.

Fisher's further assertion that the Government failed to prove a prima facie case that he used nominees to make expenditures in his behalf is frivolous. Appellant ignores the documentary evidence and the testimony of Government witnesses which established, for example, that Rosalie Fisher paid all bills for her and appellant with money Fisher supplied, that Fisher purchased cars for Mrs. Fisher and Bernice Duncan although they were the owners of record, and that Fisher paid for the home in New Jersey despite the fact that his parents held title to the property.

Fisher's argument that the Government failed to establish a "reasonably certain opening net worth" and to eliminate the possibility of non-taxable sources of income is equally without merit. As noted earlier, the Government prosecuted the case on a cash expenditure theory, not a net worth theory. The court in *Taglianetti* v. *United States*, 398 F.2d 558, 562 (1st Cir. 1968) distinguished the two methods as follows:

> "The net woth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period and deriving that part of any increase not attributable to reported income. This method, while effective against taxpayers who channel their income into investment or durable property, is unavailable against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year."

In the present case, the Government introduced evidence demonstrating that in 1967 Fisher had $30,000. in bank accounts in the name of Rosalie Fisher and his two children by Bernice Duncan. Mrs. Fisher testified that as of January, 1967 this constituted all the assets that she and the appellant possessed. The proof here made "clear the extent of any contribution which beginning resources or a diminution of resources over tme could have made to expendituers." *Taglianetti* v. *United States, supra,* 398 F.2d at 565.

Such proof satisfies the requirement in *Holland* v. *United States,* 348 U.S. 121, 132 (1954), of "the establishment, with reasonable certainty, of an opening net worth." *Taglianetti* v. *United States, supra,* 398 F.2d at 564; *Ford* v. *United States,* 210 F.2d 313 (5th Cir. 1954), *cert. denied,* 352 U.S. 833 (1956).[7] Fisher argues, however, that he had a "cash hoard" of $193,000., which had existed prior to 1967, in a safe deposit box belonging to Rosalie Fisher. However, the Government presented proof at trial to demonstrate that this money did not exist or

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[7] In *Holland* v. *United States,* the Government prosecuted on a net worth theory of proof; *Taglianetti* v. *United States* involved a prosecution under the cash expenditure theory. The *Taglianetti* court properly quoted from *Holland* as to the requirement that the Government establish a reasonably certain net worth, however, because such proof is necessary under either theory. E.g., *Dupree* v. *United States,* 218 F.2d 781 (5th Cir. 1955); *United States* v. *Caserta,* 199 F.2d 905, 907 (3d Cir. 1952). The major distinction, as noted above, is that the quantum of proof required under the cash expenditure theory, as distinguished from the net worth theory, is the reasonable showing of the available sources of funds during the years in question rather than a formal net worth statement. *Dupree* v. *United States, supra; Ford* v. *United States,* 210 F.2d 313 (5th Cir. 1954), *cert. denied,* 352 U.S. 833 (1956).

that, if it did, it had not been depleted as of 1972. In either event the existence of this cache was an issue of fact which the jury apparently rejected. The Government is not required to negate all possible sources of nontaxable income, *United States* v. *Massei*, 355 U.S. 595 (1958), and Fisher's theory does not in any way establish that the Government's showing of opening resources was insufficient.

Finally, Fisher contends that the district court erred in permitting the Government to introduce evidence of appellant's expenditures for property located in New Jersey which was placed in trust by Fisher's parents for his children, arguing that the trust instrument must be presumed valid on its face. We find no error in the ruling because the validity of the trust instrument is irrelevant to the appropriate question: that is, whether Fisher paid for the property.

The judgment is affirmed.

APPENDIX B

Recall of the Mandate

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of August, one thousand nine hundred and 75.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

GILBERT FISHER,
Defendant-Appellant.

It is hereby ordered that the motion made herein by Fred L. Wallace counsel for the appellant by notice of motion dated August 14, 1975 to recall the mandate of this court and to stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it is hereby is granted.

GRANTED

/s/ HENRY J. FRIENDLY
HENRY J. FRIENDLY
Circuit Judge

APPENDIX C

Constitutional Provisions and Statutes Involved

United States Constitution:

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Statutes:

26 U.S.C. § 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.